Paksons Enterprises Limited & another v Kenya Commercial Bank & another (Civil Suit 4 of 2022) [2025] KEHC 1201 (KLR) (27 February 2025) (Ruling)

Neutral citation: [2025] KEHC 1201 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KERICHO

CIVIL SUIT 4 OF 2022

JK SERGON, J

FEBRUARY 27, 2025

BETWEEN

PAKSONS ENTERPRISES LIMITED ..... 1ST PLAINTIFF

WESLEY ROTICH ..... 2ND PLAINTIFF

AND

KENYA COMMERCIAL BANK ..... 1ST DEFENDANT

GARAM INVESTMENT AUCTIONEERS ..... 2ND DEFENDANT

RULING

1. The application coming up for determination is a notice of motion dated 7th October, 2024 seeking the following orders;

   (i) Spent

   (ii) That the orders of the honourable court contained in paragraph (ii) of the ruling of the court dated 31st October, 2023 be revoked and/or set aside.

   (iii) That the period granted by the honourable court to the plaintiff/applicants for hearing and determination of this suit to be enlarged.

   (iv) That injunctive orders in paragraph (i) of the ruling of the honourable court be reinstated and extended for the period of the pendency of the suit as prayed in prayer (iii) of this application.

   (v) That costs of this application be provided for.

2. The application is supported by the grounds on the face of it and the supporting affidavit of Wesley Rotich the 2nd Plaintiff/Applicant.

3. The Applicant avers that this court in its ruling of 31st October, 2023 granted injunctive order against the 1st Respondent from selling, offering for sale, further advertising for sale, threatening to sell or in any other way dealing adversely with the properties known as L.R No. 631/1582 and Kericho Municipality Block 2/30 ACK Business Centre.

4. The Applicant avers that the court also directed that the matter be heard and determined within six (6) months and tied the validity of the orders for injunction to the determination of the suit within six months.

5. The Applicant avers that he was called by the 1st Defendant/Respondent's representative, one Joseph Muli, informing him that valuers were coming to value the charged properties for purposes of sale in exercise of the statutory power of sale and following the discussions he gathered that the 1st Defendant Respondent was determined to sell properties the pendency of the suit.

6. The Applicant avers that the determination of the instant suit within the period of six months was not possible on account of the interplay of many factors which rendered it impossible to have the suit heard and determined.

7. The Applicant avers that they have been in constant communication with the officials of the !st Defendant/Respondent on the possibility of regularizing the account and/or paying the entire loan amount upon removal of penalties accrued over the period of time the defaulter has been in default. The Applicant further avers that the Bank had given them time to identify assets to be liquidated in order to raise substantial amounts of money to pay the loan, the identified some properties, however, the Bank pointed out that these properties were in the name of their deceased mother and director of Pakson Limited Enterprises Limited, Annah Chebet Koech and therefore a grant of letter of administration is required in order to legally transact in the said properties.

8. The Applicant avers that this court had powers under the law to review its orders and grant appropriate orders that will facilitate justice and avoid a miscarriage of justice arising from the impending sale of the charged properties before the suit is heard and determined.

9. Joseph Muli, a Recovery Manager at Kenya Commercial Bank and the 1st Respondent filed a replying affidavit in response to the application. The 1st Respondent vehemently opposed the application on the following principal grounds:

    a. This Honourable Court is functus officio having already delivered its Ruling on the Plaintiffs' Application dated 1st August 2022 and it cannot issue any further orders in relation to that Application.

    b. The instant Application is unreasonably delayed.

    c. The Plaintiffs have not demonstrated a sufficient basis to warrant the review and/ or setting aside of the orders of the Honourable Court contained paragraph (ii) of the ruling of the court dated 31st October, 2023.

    d. The Plaintiffs have shown indolence in prosecuting the suit, having made no effort to set the matter down for hearing for over a year. Instead, they have burdened this Honourable Court with numerous applications.

    e. The Applicants' Application for reinstatement and extension of injunctive relief is not merited.

10. He further expounded on the principal grounds in which the 1st Respondent opposes the instant application.

11. He reiterated that this Court is functus officio and therefore lacks jurisdiction to entertain the instant application, the applicants approached this Honourable Court via an application dated 1st August, 2022 seeking interim orders to restrain the Respondents from selling, offering for sale, further advertising for sale, threatening to sell or in any way dealing adversely with the properties known as L.R. No. 631/1532 and Kericho Municipality Block 2/30 ACK Business Centre (hereinafter "the Suit Properties"). On 31st October 2023, this Honourable Court delivered its Ruling on the Application dated 1st August 2022, granting the Applicants an interim injunction against the Respondents for a period of six months. The Applicants neither appealed nor sought a review of the ruling. He reiterated that the ruling of this Honourable Court can only be varied through an appeal or a review, not through a further application like the present one to reinstate or extend the injunctive orders.

12. He reiterated that the instant application is unreasonably delayed and that Order 45 Rule 1 of the Civil Procedure Rules 2010 states that a party may, "apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay." This Honourable Court delivered its ruling on the Applicants' application on 31st October 2023, almost a year after delivery of the said Ruling, the Applicant's filed the instant application dated 7th October 2024. As such, having taken almost a year to file an application for review, the applicant's delay is unwarranted and they are not deserving of granting the orders sought.

13. He reiterated that the Plaintiffs have not demonstrated a sufficient basis to warrant the review and/or setting aside of orders in the ruling of the court dated 31st of October 2023, section 80 of the *Civil Procedure Act*, Chapter 21 Laws of Kenya, and Order 45 Rule 1 of the Civil Procedure Rules, this Honourable Court may review its orders on account of: the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the Applicants' knowledge or could not be produced by them at the time when the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason.

14. He reiterated that the Applicants have been indolent in prosecuting the suit and that this Court in its Ruling of 31st October 2023, this Honourable Court held that, "To avoid a situation where the applicants obtain an injunction and become inactive, it is hereby ordered that the injunctive orders shall remain in force for no more than six months from the date of this ruling." and despite a clear order, the Applicants made no effort to set the suit down for hearing for over a year. Instead, they have persistently filed multiple applications, beginning with the application dated 1st August 2024 and now the current application dated 7th October 2024, Notably, both applications are identical, seeking the same reliefs. He contended that the Applicants' conduct undermines the principle of the expeditious dispensation of justice, which this Court seeks to uphold.

15. He reiterated that the Applicants have failed to provide sufficient reasons and evidence for their failure to prosecute the suit within the time granted by this Court. Consequently, this Court should refrain from exercising its inherent powers under sections 3A and B of the *Civil Procedure Act* to condone such indolence and the instant Application should be declined.

16. He reiterated that the Applicants' application for extension of injunctive relief is not merited and contended the provisions of law relied upon by the Applicants specifically section 95 of the *Civil Procedure Act* and Order 50 Rule 6 of the Civil Procedure Rules and deemed them inapplicable in relation to the instant application and are calculated to mislead the Honourable Court.

17. He contended that the 1st Respondent was entitled to exercise its statutory right of sale, he relied on the provisions of Order 40 Rule 6 of the Civil Procedure Rules which states: "Where a suit in respect of which an interlocutory injunction has been granted is not determined within twelve months from the date of the grant, the injunction shall lapse unless the court, for sufficient reason, orders otherwise."

This provision mandates that an interlocutory order remains in force for twelve months unless the court, upon finding sufficient reason, extends it beyond this period. However, such an extension can only be granted after the initial twelve months, and must be justified at that time. In the present case, the injunction was granted for six months, not twelve. Therefore, the Applicants cannot invoke this provision, as the twelve-month period has not yet elapsed. The court explicitly provided reasons for granting a six-month period, fully aware that the suit could be heard and determined within that time frame. The Applicants, however, failed to act and were indolent, leaving no justification for extending the period.

18. He contended that in applying sections 1A and 1B of the *Civil Procedure Act*, this Honourable Court is guided by and to promote the overriding objective of the Act and its Rules. This includes ensuring the just determination of proceedings, the efficient handling of the court's business, the timely resolution of cases, and the affordability of legal costs for all parties involved. The Applicants' conduct in these proceedings fly in the face of these requirements and therefore they were undeserving of the orders sought.

19. This court directed the parties to canvas the application via oral submissions.

20. Mr. J.K Mutai the Learned Counsel for the Applicant submitted that the instant application is pegged on section 1A, 1B and 1C of the *Civil Procedure Act* and article 159 2 (d) of *the Constitution* and the grounds set out on the face on the notice of motion and the facts deponed on the supporting affidavit. He further submitted that this court has the discretion to enlarge time in the circumstances of the case under section 95 of the *Civil Procedure Act*. He reiterated that it was not humanly possible to have the matter heard and determined in six months.

21. Mr. Mbaya the Learned Counsel for the 1st Respondent/Defendant submitted that he would be relying on the replying affidavit sworn by Joseph Muli. He submitted that the applicants are not in hurry to have the suit heard and determined, they disregarded this court's orders in the ruling dated 31st October, 2024 and went to slumber. He cited the case of Mulela v Fort Properties Limited (Environment & Land Case 162 of 2015) [2024] KEELC 7465 (KLR) (13 November 2024) (Ruling) where the court pointed out that; Under order 45 sub-rule (1)(b) applications for review should be made before the court which passed the decree or made the order without undue delay. He reiterated that the instant application ought to have been made without unreasonable delay yet the instant application was lodged after twelve months.

22. I have considered the application, response and oral submissions by parties and I find that the issue (s) for determination are whether to review and/or set aside the orders of this court in its ruling dated 31st October, 2024, whether to maintain enlarge the time for hearing and determine the instant suit and whether to extend the grant injunctive reliefs for the period of the pendency of the suit.

23. On the issues as to whether to review and/or set aside the orders of this court in its ruling dated 31st October, 2024. I have considered the arguments by both parties and I find that the applicants have not demonstrated grounds for review and /or setting aside the orders of this court. Order 45 Rule 1 of the Civil Procedure Rules, 2010 further provides for review in the following manner: Any person considering himself aggrieved—

    a. by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

    b. by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or

the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay. The import of Section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules was considered by the High Court in Miscellaneous Application 317 of 2018, Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya [2019] eKLR. Where the Court elucidated the principles for consideration in reviewing its own decisions as follows:

> "i. A court can review its decision on either of the grounds enumerated in Order 45 Rule 1 and not otherwise.
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> ii. The expression "any other sufficient reason" appearing in Order 45 Rule 1 has to be interpreted in the light of other specified grounds.
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> iii. An error which is not self-evident and which can be discovered by a long process of reasoning cannot be treated as an error apparent on the face of record justifying exercise of power under Section 80.
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> iv. An erroneous order/decision cannot be corrected in the guise of exercise of power of review.
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> v. A decision/order cannot be reviewed under Section 80 on the basis of subsequent decision/judgment of a co-ordinate or larger Bench of the tribunal or of a superior court.
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> vi. While considering an application for review, the court must confine its adjudication with reference to material, which was available at the time of initial decision. The happening of some subsequent event or development cannot be taken note of for declaring the initial order/ decision as vitiated by an error apparent.
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> vii. Mere discovery of new or important matter or evidence is not sufficient ground for review. The party seeking review has also to show that such matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the court/tribunal earlier.
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> viii. A mistake or an error apparent on the face of the record means a mistake or an error, which is prima-facie visible and does not require any detailed examination. In the present case the petitioner has not been able to point out any error apparent on the face of the record.
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> ix. Section 80 of the Civil Procedure Code provides for a substantive power of review by a civil court and consequently by the appellate courts. The words occurring in Section 80 mean subject to such conditions and limitations as may be prescribed thereof and for the said purpose, the procedural conditions contained in Order 45 Rule 1 must be taken into consideration. Section 80 of the Civil Procedure Code does not prescribe any limitation on the power of the court, but such limitations have been provided for in Order 45 Rule 1.

x. The power of a civil court to review its judgment/decision is traceable in Section 80 CPC. The grounds on which review can be sought are enumerated in Order 45 Rule 1."

The foregoing analysis points to only one thing; that the application herein does not meet the legal threshold for review under section 80 of the *Civil Procedure Act* and order 45 of the Civil Procedure Rules.

24. On the issue as to whether to enlarge time to hear and determine the suit. On one part, the applicant argues it was impractical to have the matter heard and determined in six months. On the other part, the respondent faulted the applicant for having made no effort to set the suit down for hearing for over a year and instead persistently filed multiple applications seeking the same reliefs. The respondent was of the view that the applicants' conduct undermines the principle of the expeditious dispensation of justice. The relevant provisions on enlargement of time are section 95 of the *Civil Procedure Act* which provides that: "Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired." and Order 50 Rule 5 of the Civil Procedure Rules 2010 which gives unfettered power to the court "to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed..." There is no doubt that the delay is substantial. However, the applicant has demonstrated the efforts in trying to set up the substantive suit for hearing. This court is therefore inclined to exercise its discretion for enlargement of time in favour of the applicant.

25. On the issue as to whether to reinstate and extend orders for injunctive relief pending the hearing and determination of this suit, I find that that this court having rendered itself on the issue of interlocutory relief in its ruling of 31st October 2023, where this Honourable Court held that, "To avoid a situation where the applicants obtain an injunction and become inactive, it is hereby ordered that the injunctive orders shall remain in force for no more than six months from the date of this ruling." The temporary injunctive orders issued on 31/10/2023 actually lapsed on 1st November, 2024 by virtue of Order 40 rule 6 of the Civil Procedure rules. The Plaintiff/Applicant has sought for the orders to be reinstated and extended for the period of the pendency of the suit. It is trite law that Court of Law cannot reinstate what has lapsed. The Court may only issue fresh injunctive orders upon application by a party. The Applicant has not made such an application

26. Consequently, the Notice of Motion dated 7th October, 2024 partially succeeds. The period fixed by this court to have this suit heard and determined is hereby extended by a further three (3) months with effect from today's date. Each party to bear their own costs.

DELIVERED, SIGNED AND DATED AT KERICHO THIS 27TH DAY OF FEBRUARY, 2025.

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J.K. SERGON

JUDGE

In the Presence of:-

C/Assistant – Rutoh

Kirui evanson holding brief for J. K. Mutai for the Plaintiff

Echom holding brief for B. Khaemba for Plaintiff

Mbaya for the 1st Defendant